Supreme Court, U.S.
FILED

94 849 NOV 7 1994

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1994

JOSEPH M. MCDADE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

James D. Crawford*
Schnader, Harrison, Segal & Lewis
1600 Market Street, Suite 3600
Philadelphia, PA 19103
(215) 751-2162

Sal Cognetti, Jr.
Foley, Cognetti & Cowley
507 Linden Street, 7th Fl.
Scranton, PA 18503

G. Robert Blakey
Notre Dame Law School
Notre Dame, IN 46556

Attorneys for the Honorable Joseph M. McDade

* *Counsel of Record*

HDPP

QUESTIONS PRESENTED

1. Did the court of appeals err when it concluded that the Speech or Debate Clause did not mandate dismissal of the extortion, bribery and gratuity allegations in the indictment, even though proof of them would require proof of committee membership on legislative committees, participation in the committee process and the exercise of legislative oversight functions?

2. Did the court of appeals err in failing to find that legislative status, when used in an indictment against a Member of Congress as a proxy for legislative acts and motivations, is protected by the Speech or Debate Clause?

3. Did the court of appeals err when it concluded that the Speech or Debate Clause did not require specific pleading, or a bill of particulars, as well as supporting proof, subject to appellate review, to prevent Members of Congress from being questioned outside of Congress for their legislative acts and motivations?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

The named appellant in the court of appeals and the petitioner here is The Honorable Joseph M. McDade, United States Congressman for the Tenth Congressional District of Pennsylvania. The named appellee in the court of appeals and the respondent here is the United States of America. There are no corporate entities party to this proceeding.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding and Designation of Corporate Relationships ii

Table of Authorities vi

Opinions Below 3

Statement of Jurisdiction 3

Constitutional Provision Involved 3

Statement of the Case 4

Reasons for Granting the Writ 6

I. AS PART OF ITS PURPOSE OF PROTECTING THE LEGISLATIVE PROCESS, THE SPEECH OR DEBATE CLAUSE PROTECTS THE COMMITTEE PROCESS, OVERSIGHT FUNCTIONS RELATED TO THE COMMITTEE PROCESS, AND COMMITTEE STATUS 7

A. The Committee Process and Legislative Oversight Are Core Legislative Activities Integral to the Legislative Process 8

1. The Indictment Charges Conduct Directly Protected by the Speech or Debate Clause . . . 14

TABLE OF CONTENTS - (*Continued*)

Page

2. The Indictment Forces Congressman McDade To Introduce Speech or Debate Protected Material in His Defense 17

B. The Court of Appeals Wrongly Held That the Use of Committee Status in the Indictment Did Not Violate the Speech or Debate Clause, Thereby Creating a Conflict Between Circuits .. 20

II. ONLY ADEQUATE PRETRIAL PROCEDURES CAN PROTECT A MEMBER'S RIGHT NOT TO BE QUESTIONED OUTSIDE CONGRESS CONCERNING LEGISLATIVE ACTIVITIES. 23

Conclusion 30

TABLE OF CONTENTS - (*Continued*)

Page

Appendix (Bound Separately)

Opinion of the United States Court of Appeals for the Third Circuit in *United States of America v. Joseph M. McDade*, dated June 15, 1994 . . . . . A-1

Opinion of the United States District Court for the Eastern District of Pennsylvania in *United States of America v. Joseph M. McDade*, dated May 6, 1993 . . . . . A-62

Order of the United States Court of Appeals for the Third Circuit in *United States of America v. Joseph M. McDade*, denying petition for rehearing and suggestion for rehearing in banc, dated August 9, 1994 . . . . . A-159

TABLE OF AUTHORITIES

Page

Cases

Abney v. United States, 431 U.S. 651 (1977) 24

Digital Equipment Corp. v. Desktop Direct, Inc., 114 S. Ct. 1992 (1994) 28

Dombrowski v. Eastland, 387 U.S. 82 (1967) 7, 17, 23

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) 1, 6, 8, 9

Grady v. Corbin, 495 U.S. 508 (1990), *overruled on other grounds by United States v. Dixon*, 113 S. Ct. 2849 (1993) 25, 26

Gravel v. United States, 408 U.S. 606 (1972) . . . . . *passim*

Helstoski v. Meanor, 442 U.S. 500 (1979) 2, 7, 24

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 1, 25

Kilbourn v. Thompson, 103 U.S. 168 (1880) 6, 27

McGrain v. Daugherty, 273 U.S. 135 (1927) 10

TABLE OF AUTHORITIES - (*Continued*)

Page

National Organization for Women, Inc. v. Scheidler, 114 S. Ct. 798 (1994) 24

Powell v. McCormick, 395 U.S. 486 (1969) 17

Sinclair v. United States, 279 U.S. 263 (1929) 10

Tenney v. Brandhove, 341 U.S. 367 (1951) 29

United States v. Bendis, 681 F.2d 561 (9th Cir.), *cert denied*, 459 U.S. 973 (1982) 25

United States v. Booth, 673 F.2d 27 (1st Cir.), *cert denied*, 456 U.S. 978 (1982) 25

United States v. Brewster, 408 U.S. 501 (1972) 12, 25

United States v. Castro, 629 F.2d 456 (7th Cir. 1980) 26

United States v. Inmon, 568 F.2d 326 (3d Cir. 1977) 25, 27

United States v. Jabara, 644 F.2d 574 (6th Cir. 1980) 25

TABLE OF AUTHORITIES - (*Continued*)

Page

United States v. Johnson, 383 U.S. 169 (1966) 12, 13

United States v. Loyd, 743 F.2d 1555 (11th Cir. 1984) 25

United States v. Mallah, 503 F.2d 971 (2d Cir.), *cert. denied*, 420 U.S. 995 (1975) 26

United States v. Ragins, 840 F.2d 1184 (4th Cir. 1988) 25, 27

United States v. Stricklin, 591 F.2d 1112 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979) 25

United States v. Swindall, 971 F.2d 1531 (11th Cir. 1992), *cert. denied*, 114 S. Ct. 683 (1994) 2, 19, 21, 22

United States v. Tercero, 580 F.2d 312 (8th Cir. 1978) 25

Watkins v. United States, 354 U.S. 178 (1957) 10

STATUTES

15 U.S.C. § 637(a) 5

TABLE OF AUTHORITIES - (*Continued*)

Page

18 U.S.C. § 201(c)(1)(B) 4

18 U.S.C. § 371 4

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1291 . . . . . 6, 24

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) 4, 15, 16

OTHER AUTHORITIES

Jefferson's Manual and Rules of the House of Representatives Rule XI, C1. 6 (3) (1991) 16

United States Constitution, Article I, § 6 3

No. _____

In The
Supreme Court of the United States
October Term, 1994

JOSEPH M. MCDADE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

The decision of the court of appeals in this case represents an unprecedented retreat from the jurisprudence of this Court protecting Members of Congress under the Speech or Debate Clause of the Federal Constitution. Disregarding the consistent admonition that the Speech or Debate Clause must be read broadly to effect its purpose of protecting the legislative process and the legislators themselves, *see, e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501-02 (1975) (citations collected); *Gravel v. United States*, 408 U.S. 606, 617 (1972); *Hutchinson v.*

Proxmire, 443 U.S. 111, 124 (1979), the court of appeals applied the narrowest possible reading to the Clause, to the issues raised by Congressman Joseph M. McDade and to the court's own jurisdiction under *Helstoski v. Meanor*, 442 U.S. 500, 506-07 (1979), to deal with prosecutions that threaten legislative autonomy.

Specifically, the court of appeals refused to apply the protections of the Speech or Debate Clause to legislative committees of Congress and to their oversight functions. In so doing, it failed to follow decisions of this Court, and created a conflict between itself and other courts of appeals regarding the Speech or Debate Clause. Accordingly, this petition raises for consideration significant issues of Speech or Debate analysis that are not peculiar to this case alone but rather are issues of general application in Speech or Debate cases: (1) does not the Speech or Debate Clause protect the committee process generally and the oversight functions of congressional committee members in particular? and (2) what pretrial mechanisms are necessary to ensure that a Member's right not to be questioned outside Congress is not vitiated by an unconstitutional trial? In addition, it calls on this Court to resolve the acknowledged conflict between the decision below and the decision of the United States Court of Appeals for the Eleventh Circuit in *United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1992), *cert. denied*, 114 S. Ct. 683 (1994).

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (A-62 to A-158) is reported at 827 F. Supp. 1153 (E.D. Pa. 1993). The opinion of the United States Court of Appeals for the Third Circuit (A-1 to A-61) is reported at 28 F.3d 283 (3d Cir. 1994). The order of the court of appeals denying the petition for rehearing and suggestion for rehearing in banc (A-159 to A-160) is reported at 28 F.3d 283, 305 (3d Cir. 1994).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 15, 1994. The order denying the petition for rehearing and suggestion for rehearing in banc was entered on August 9, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article I, § 6 of the United States Constitution, which contains the Speech or Debate Clause, provides:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the session of their respective Houses, and in going to and

> returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.* (emphasis added)

STATEMENT OF THE CASE

On May 5, 1992, a federal grand jury in the Eastern District of Pennsylvania returned a five-count indictment against The Honorable Joseph M. McDade. Counts one and three of the indictment allege conspiracy under 18 U.S.C. § 371; counts two and four allege violations of the gratuities statute, 18 U.S.C. § 201(c)(1)(B) (formerly § 201(g)); and count five alleges a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) ("RICO").

The Department of Justice ("Department") seeks to prove that Congressman McDade abused influence he allegedly had by virtue of his position as ranking minority Member of the House Small Business Committee and of the House Appropriations Committee, Subcommittee on Defense Appropriations. The allegations in the indictment address, *inter alia*, (1) Congressman McDade's oversight efforts as a member of the Subcommittee on Defense Appropriations to monitor implementation of the Subcommittee's appropriation of funds for an Army radio system called "SINCGARS" (A-4 to A-5; A-58 to A-59); (2) Congressman McDade's fact-finding visit, made as a member of the Subcommittee on Defense Appropriations together with other Members of Congress, to determine whether to appropriate funds for a facility that the Department of Defense wanted to purchase; and (3) Congressman McDade's

contacts with the Navy and other contacts with the executive branch in connection with his position on the Small Business Committee, with relation to United Chem Con Corporation ("UCC"), a minority-owned small business under 15 U.S.C. § 637(a) that was admitted into the Minority Small Business and Capital Ownership Program of the Small Business Authority, under the jurisdiction of the Small Business Committee. (A-3 to A-4)

Additionally, the putative RICO enterprise charged in count five of the indictment is defined as an association-in-fact comprised of Congressman McDade's congressional offices in Washington and Scranton and their staffs together with the staff members of congressional committees who worked at his direction, "which enterprise was commonly known as The Office of the Honorable Joseph M. McDade." (A-119) While the charged enterprise expressly includes congressional offices, committee staffs and committee positions, it does not distinguish between the various functions of the staffs that comprise this purported association-in-fact. Nor does it allege that the purported members of the enterprise acted outside the scope of their committee or legislative responsibilities. Indeed, the Department stated that it intends to introduce testimony of the "budgetary process by which Congress authorizes the appropriation of funds to pay for specific military programs." (Government's Omnibus Motion in Limine and Memorandum of Law at 10-11)

Congressman McDade filed an omnibus motion to dismiss the indictment in January 1993. The motion sought, *inter alia*, dismissal of the indictment for violation of the Speech or Debate Clause or, in the alternative, a bill of particulars and an offer of proof by the Department that would demonstrate that, despite the allegations placing Congressman McDade's legislative activities at issue, the trial would not violate the Clause. The district court denied the motion, and Congressman McDade appealed to the United States Court of Appeals for the Third Circuit under 28 U.S.C. § 1291 and *Helstoski II*. The court of appeals affirmed the district court's decision, one judge dissenting in part. Four judges dissented from the denial of Congressman McDade's petition for rehearing.

REASONS FOR GRANTING THE WRIT

This Court has emphasized that the Speech or Debate Clause must be interpreted "liberally, that the full design of it may be answered." *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1880); *see also Eastland*, 421 U.S. at 501-02. "Rather than giving the Clause a cramped construction," *Gravel*, 408 U.S. at 618, it must be construed "liberally, that the full design of it may be answered." *Kilbourn*, 103 U.S. at 203; *see also Eastland*, 421 U.S. at 501-02 (citing cases). Moreover, the Speech or Debate Clause, like the Double Jeopardy Clause, confers a right not to be "questioned," or in other words, not to be subjected to an improper trial, by protecting Members of Congress "not only from the consequences of litigation's results but also from the burden

of having to defend themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); *see also Helstoski II*, 442 U.S. at 508. The nature of that right must be considered in determining whether a prosecution predicated on committee membership and the exercise of committee oversight functions violates the Clause.

I. AS PART OF ITS PURPOSE OF PROTECTING THE LEGISLATIVE PROCESS, THE SPEECH OR DEBATE CLAUSE PROTECTS THE COMMITTEE PROCESS, OVERSIGHT FUNCTIONS RELATED TO THE COMMITTEE PROCESS, AND COMMITTEE STATUS.

This Court has expressly recognized that committee participation and legislative oversight functions performed pursuant to committee participation are core components of the legislative process. The court of appeals, however, refused to give credence to this Court's interpretation of these elements of the legislative process, which are central in prosecutions of Members of Congress. Moreover, it rejected the holding of the United States Court of Appeals for the Eleventh Circuit in *United States v. Swindall*, *supra*, that committee status is protected by the Speech or Debate Clause. Accordingly, this Court should hear this case to resolve the conflicts and to provide the necessary guidance for the lower courts, which are increasingly confronted with prosecutions implicating the committee process.

A. The Committee Process and Legislative Oversight Are Core Legislative Activities Integral to the Legislative Process.

The court of appeals erred in this case by failing to recognize the integral role that the committee process and legislative oversight play in the protected legislative process. This Court already has held that in addition to literal speech and debate on the floor of either House, the Clause reaches any matters that are "an integral part" of the legislative process. *Gravel*, 408 U.S. at 625. The protections of the Clause thus are triggered by any inquiry into matters that "may fairly be deemed within [the Subcommittee's] province." *Eastland*, 421 U.S. at 506; *see also Gravel*, 408 U.S. at 624. Under *Eastland* and *Gravel*, the committee process is an integral part of the legislative process, and core legislative activity includes committee activity.

In *Gravel*, which arose from senatorial oversight hearings concerning the Vietnam conflict, the Court determined that a legislative aide receives the same immunities under the Speech or Debate Clause as does the Member of Congress for whom the aide performs legislative work. The Court therefore considered the extent to which the immunity extended to the Member of Congress himself. *Gravel*, 408 U.S. at 613. It found "incontrovertible" the claim that the Clause protects a Member of Congress with respect to events occurring at a subcommittee meeting. *Id.* at 615. The Court held that the Clause "protects Members against prosecutions that directly impinge upon or threaten the legislative process," *id.* at 616, because the "fundamental

purpose" of the Speech or Debate Clause is to "free[] the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Id.* at 618. The Clause therefore protects all matters that are "an integral part of the deliberative and communicative processes by which Members participate in *committee* and House proceedings with respect to the consideration and passage or rejection of proposed legislation or *with respect to other matters which the Constitution places within the jurisdiction of either House.*" *Id.* at 625 (emphasis added). Thus, in a case expressly concerning the committee process and the oversight role of Congress, this Court established the touchstone by which to determine when the protections of the Speech or Debate Clause attach.

Similarly, in *Eastland*, the Court held that investigative activities such as issuing subpoenas, performed by Members of Congress in connection with their committee responsibilities, are activities that take place "in a session of the House by one of its members in relation to the business before it." *Eastland*, 421 U.S. at 503 (quoting *Kilbourn*, 103 U.S. at 204). Thus, committee investigative work is protected under the Speech or Debate Clause as "essential to legislating." *Id.* at 504-07 (quoting *Gravel*, 408 U.S. at 621). The Court then examined the subcommittee work at issue in *Eastland* and determined that it fell within the "sphere of legitimate legislative activity" that the Clause protects. *Id.* at 506.

The court of appeals disregarded this essential tenet of Speech or Debate Clause analysis, refusing to hold that the protections of the Clause are triggered by inquiry into a Member's involvement in and oversight performed in connection with congressional committees and subcommittees, whose work is indisputably legislative. (A-15 to A-17) The court of appeals failed to consider that the "act" of legislating is not and never has been limited to drafting, introducing, debating and voting on bills; and that the Clause protects not legislative "acts" as such but rather the "legislative process" as a whole and core legislative functions within that process. Decisions of this Court in addition to *Gravel* and *Eastland* demonstrate that the committee process, as well as its attendant fact-finding and oversight responsibilities, are core legislative activities. *See, e.g., Watkins v. United States*, 354 U.S. 178, 187 (1957); *Sinclair v. United States*, 279 U.S. 263, 297-98 (1929); *McGrain v. Daugherty*, 273 U.S. 135, 151 (1927).

Thus, as this Court already has recognized, Congress functions *both* by passing legislation *and* by such legislative activities as performing committee investigations, overseeing implementation of its legislation, engaging in investigative activities, and appropriating funds as part of the budgetary process. Accordingly, appropriations committees, such as the Subcommittee on Defense Appropriations of which Congressman McDade is a member, have a continuing responsibility to supervise and implement appropriations over which they have jurisdiction. Only by performing such oversight -- whether by committee hearings,

communications and meetings with the appropriate departments within the executive branch, or other means – can the Congress follow through on its legislation and budgetary appropriations to assure that they function as Congress intended.

However, the majority of the court of appeals viewed legislative oversight as entirely separate from legislative activity, and placed it on a spectrum somewhere between such traditionally protected activities as committee hearings and such traditionally unprotected activities as "routine casework for constituents." (A-44) The error in this reasoning is that legislative oversight is as integral to the legislative process as are committee hearings (which in fact often are held for oversight purposes) or votes. Moreover, even though the court of appeals characterized "oversight" as "broad" (A-43), it failed to make any effort (or to require the district court to make any effort) to determine whether the allegations in a particular indictment that are based on legislative oversight and committee involvement fall within the protection of the Speech or Debate Clause. (A-44 to A-46) Rather, the effect of its holding is that the very breadth of congressional oversight removes it from Speech or Debate protection.

Laboring under its fundamental misconception of the role of legislative oversight and committee participation, the court of appeals treated as controlling two decisions by this Court that have no relevance to prosecutions such as this one that rely on committee participation, oversight and

membership. *See United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Johnson*, 383 U.S. 169 (1966). (A-11 to A-14; A-24 to A-26; A-43)

In *Brewster*, this Court held that Senator Brewster could be prosecuted for taking bribes in return for promises to take actions that would, themselves, be protected under the Speech or Debate Clause. The bribes could be proven, only Senator Brewster's actions in response to the bribes could not. The indictment here, however, centers not on any promise of Congressman McDade to perform acts, legislative or otherwise, but on his acceptance of alleged gratuities preceded or followed by his performance of a number of acts that were clearly or at least arguably instances of congressional oversight. (Indictment, Count I, Overt Acts 2, 3, 6, 11, 16-18, 27, 38; Count III, Overt Acts 9, 10, 12, 14, 17; Count V, Acts 9, 17) Those acts must be proven to establish the gratuities. In the face of these allegations, *Brewster* simply does not apply.

The court of appeals also relied on *Brewster* for the proposition that because the Speech or Debate Clause does not prohibit reference to mere membership in Congress (A-14), the Clause also would not prohibit reference to committee membership. (A-16) However, the court of appeals overlooked the fact that, while membership in Congress is a necessary element of the crimes charged in *Brewster* and even in this indictment, committee membership is not a necessary element to be proven in any crime. References to committee membership are gratuitous.

Accordingly, the analogy is flawed, and the court of appeals' reliance on *Brewster* misplaced.

Similarly, in *Johnson*, the Court held that a Member could be prosecuted for attempting to influence the Department of Justice to dismiss a pending indictment. 383 U.S. at 171-72. The court of appeals mischaracterized this narrow holding as stating broadly that "the Speech or Debate Clause does not apply to efforts by members of Congress to influence the Executive Branch." (A-43) In *Johnson*, not only was the contact with the executive a crime in itself, but the Member of Congress had no legislative responsibilities related to the Department of Justice, and thus the contact with the executive branch was "in no wise related to the due functioning of the legislative process." *Id.* at 172. In this case, by contrast, Congressman McDade sat on congressional committees that exercise jurisdiction directly over legislation administered by the very agencies in the executive branch with which he is alleged to have had contact; and those contacts indisputably related to that committee jurisdiction. The court of appeals utterly ignored this critical distinction, instead misapplying *Johnson* to hold that contacts with the executive branch never constitute protected legislative oversight.

Having ignored this Court's holdings in *Gravel* and *Eastland*, and misapplied *Brewster* and *Johnson*, the court of appeals permitted the Department to violate the Speech or Debate Clause in two ways: by pleading Speech or Debate protected activities in the indictment, and by forcing

Congressman McDade to rely on Speech or Debate protected material as the only means to defend himself against the indictment.

1. The Indictment Charges Conduct Directly Protected by the Speech or Debate Clause.

The first four counts of the indictment, regarding the gratuities and conspiracy statutes, include many impermissible references to Speech or Debate protected material. For example, the indictment alleges that Congressman McDade *in his role as ranking minority member of the Subcommittee on Defense Appropriations* contacted officials in the executive branch responsible for implementing a program overseen by that subcommittee and for expending funds appropriated by that subcommittee. (A-45; A-70) Such allegations question Congressman McDade about core legislative activity of the type that *Gravel* defined as "an integral part of the deliberative and communicative processes" of Congress. *Gravel*, 408 U.S. at 625. Indeed, the oversight engaged in by Congressman McDade that is the subject of the indictment is different from that at issue in *Gravel* only in form, not in substance: *Gravel* concerned oversight during a hearing, while this case concerns oversight through correspondence. Nevertheless, the court of appeals focused only on the fact that the allegations involved contact with the executive branch, and held that such contact always falls outside the protected legislative sphere – without ever examining whether the contacts themselves were part of core legislative activities

engaged in as part of the legitimate legislative process, as indeed they were. Had the contact occurred in a formal hearing rather than through informal channels, it undeniably would have been protected. That informal contact, regardless of its characterization by the Department, is equally protected.

The very essence of the RICO count of the indictment demonstrates that it is built entirely on the Speech or Debate protected sphere. The indictment charged an association-in-fact RICO enterprise, defined as follows:

> Defendant Joseph M. McDade supervised the operations of his Congressional offices in Washington, D.C., and in the 10th Congressional District of Pennsylvania, and the activities of the congressional staff Members working in those offices. In addition, he supervised the activities of Congressional staff Members who worked at his direction on the congressional committees on which he held official positions. Defendant Joseph M. McDade, together with these offices and individuals, constituted an enterprise ..., which enterprise was commonly known as The Office of the Honorable Joseph M. McDade.

(A-119) (summarizing allegations) This purported enterprise impermissibly inquires into the core legislative sphere protected by the Speech or Debate Clause; and proof of the enterprise would absolutely require the sort of proof of the legislative process that the Clause forbids.

First, the two committees included in the charged enterprise and their staffs are purely legislative: "professional staff Members . . . shall not be assigned any duties other than those pertaining to committee business." *Jefferson's Manual and Rules of the House of Representatives*, Rule XI, C1. 6 (3) (1991). *Gravel* also makes clear that committee aides receive the same Speech or Debate protection as do Members of Congress. Committee work was a legislative *obligation* for Congressman McDade as a member of the congressional committees. His supervision of committee staff is a legislative act that is a necessary and inescapable aspect of the committee process, which itself is a necessary and inescapable fact of being a Member of Congress. Indeed, the primary reason for the existence of even the personal congressional office is to perform legislative activities, such as drafting legislation and gathering information.[1]

Moreover, the alleged goal of the RICO enterprise was "the use of his Office as a vehicle" allegedly to violate the law. (Indictment, Count V, ¶ 5) However, the Department cannot demonstrate any alleged misuse of "the Office" without contrasting it to the *proper* use of "the Office" – that is, the legislative committees, the congressional offices, their respective staff members, and Congressman McDade's own role on the committees. There can be no question that under this Court's precedents that

---

[1] While congressional offices and their staff members may also perform some non-legislative duties such as constituent services, the indictment does not limit their inclusion in the definition of the enterprise to such non-legislative functions.

would violate the Speech or Debate Clause by questioning a Member of Congress as to integral aspects of the legislative process. Yet that is precisely what the court of appeals authorized. (A-32) (speculating on Department's ability to prove enterprise); (*see also* A-85) This Court should grant certiorari to correct that error, both to prevent a trial that contravenes the protections of the Clause and to instruct the courts of appeals more specifically as to the proper application of the Clause in committee-related prosecutions.

2. The Indictment Forces Congressman McDade To Introduce Speech or Debate Protected Material in His Defense.

The Speech or Debate Clause protects Members of Congress not only from prosecutions that directly rely on matters within the protected legislative sphere, but also from being forced to use evidence of such protected matters to defend against a prosecution. This Court has stated that there is "no doubt that [a Member of Congress] may not be made to answer – either in terms of questions *or in terms of defending himself from prosecution* . . . ." *Gravel*, 408 U.S. at 616 (emphasis added); *see also Dombrowski*, 387 U.S. at 85 (Members of Congress are protected by the Clause "from the burden of defending themselves"); *Powell v. McCormick*, 395 U.S. 486, 505 (1969) (the Clause protects Members of

Congress from being "called into court to defend their actions").[2]

If this case is permitted to proceed to a trial, Congressman McDade would be forced to waive his Speech or Debate Clause protection – in violation of the Clause itself. For example, if the Department were permitted to introduce evidence of Congressman McDade's alleged influence solely by virtue of his position as ranking minority Member of the Subcommittee on Defense Appropriations and the Small Business Committee (as the indictment alleges), Congressman McDade could only defend himself by explaining his role on these committees and thus in the legislative process itself – precisely what the Speech or Debate Clause prohibits the Department from doing directly. Nevertheless, the court of appeals held that it would not violate the Clause to force a Member of Congress to choose between his Sixth Amendment right to defend himself and his Speech or Debate right not to be questioned (including forced to defend) for his role in the legislative process. (A-26 to A-28)

---

[2] The court of appeals relied on *dicta* from this Court indicating that a Member may be able to waive the Speech or Debate Clause and *choose* to introduce evidence of protected legislative activities. (A-27 to A-28) However, even that question is not settled, and certainly this Court has never held that a prosecution may force a Member of Congress to waive the protections of the Clause in order to defend himself.

The United States Court of Appeals for the Eleventh Circuit specifically held, in contrast to the court of appeals here, that such a choice violates the Speech or Debate Clause:

> The district court prohibited the government from offering proof that Swindall "ever read the bills," but it allowed the jury to *assume* that Swindall read the bills. That the inference refers to a legislative act that possibly never took place does not mitigate the Speech or Debate violation. In fact, it makes it worse: to rebut the inference, Swindall *would be forced to answer for his entire approach to the legislative process* to explain why he did not know of the contents of the bills. Allowing the inference, which virtually compels Swindall to justify his legislative actions, frustrates the purpose of the Speech or Debate privilege.

United States v. Swindall, 971 F.2d at 1546 (first emphasis in original; second emphasis added). The court of appeals' rejection of Congressman McDade's argument that the indictment forces him to answer for, and with, evidence of protected legislative activity, thus conflicts with decisions of this Court and of another court of appeals, and is an appropriate matter for certiorari. (A-26 to A-28)

B. The Court of Appeals Wrongly Held That the Use of Committee Status in the Indictment Did Not Violate the Speech or Debate Clause, Thereby Creating a Conflict Between Circuits.

The court of appeals in this case held that Congressman McDade's committee status, relied on repeatedly in the indictment, was not protected by the Speech or Debate Clause. In so doing, it tried to distinguish the decision of the Court of Appeals for the Eleventh Circuit in *United States v. Swindall*, *supra*, and to the degree it could not distinguish it, rejected that decision. (A-21 to A-26) The *Swindall* court had addressed the issue of whether legislative status pleaded in an indictment, both as distinct from legislative activity and when used as a surrogate for legislative activity, violated the Speech or Debate Clause. It answered affirmatively:

> There are two reasons why the Speech or Debate Clause prohibits inquiry into a member of Congress's committee assignments even if the member's specific legislative acts are not mentioned. First, our review of Supreme Court precedent convinces us that the privilege protects legislative status as well as legislative acts. Second, here the government's inquiry into Swindall's committee memberships actually amounted to an inquiry into legislative acts. The government was allowed to argue a permissive inference that Swindall knew the details of the money-laundering statutes because of his status

> as a member of the Banking and Judiciary Committees. If the inference is drawn that Swindall acquired knowledge of the statutes *through* committee memberships, one sees that Swindall could have acquired such knowledge *only* by performing a legislative act such as reading a committee report or talking to a member of his staff.

Id. at 1543 (emphasis in original).

By contrast, the court of appeals here held that committee status is not protected under any circumstance and that evidence of committee status was not used as a proxy in the indictment against Congressman McDade even though it draws the same sort of "permissive inferences" that the *Swindall* court found violated the Speech or Debate Clause. (A-23 to A-26) This approach creates a direct conflict between the court of appeals' decision in this case and the decision of the Court of Appeals for the Eleventh Circuit in *Swindall*. (A-26) This Court should grant certiorari to resolve that conflict.

Focusing on the essence of the legislative process, the *Swindall* court squarely and correctly held that the use of committee "status" or the mention of committee membership as an evidentiary proxy for actual legislative acts violates the Speech or Debate Clause. It did so not by reference to static categories of "status" and "acts," but rather by a thoughtful analysis of what the Speech or Debate Clause, as interpreted by this Court, directs a court to examine: "does the inquiry into a legislator's committee

membership directly impinge on or threaten the legislative process? Does it make legislators accountable before a possibly hostile judiciary? And does it indirectly impair legislative deliberations?" 971 F.2d at 1545 (citations omitted). The *Swindall* court answered all three questions in the affirmative. The court of appeals here refused even to ask them.

The *Swindall* court also examined the prosecution's case to determine whether references to legislative or committee "status" (as defined by its tripartite inquiry) were also used as a surrogate for use of explicit legislative "acts." It noted that "it is inaccurate to call an inquiry into committee membership an inquiry into status rather than legislative activities" because the reference to committee membership gave rise to a "permissive inference [that] allowed the jury to infer that [the Member of Congress] performed legislative *acts* . . . ." *Id.* at 1546 (emphasis in original). Thus, the *Swindall* court perceived the prosecution's real motive in referring to and proving committee membership – which, as noted *supra*, is distinguishable from congressional membership in that it is not an element of a crime that the prosecution must prove. Yet the court of appeals rejected this aspect of *Swindall* as well – not by distinguishing it on its facts (since it is materially indistinguishable), but rather by repudiating its

legal interpretation of the Clause and this Court's precedents.[3] (A-21 to A-26)

II. ONLY ADEQUATE PRETRIAL PROCEDURES CAN PROTECT A MEMBER'S RIGHT NOT TO BE QUESTIONED OUTSIDE CONGRESS CONCERNING LEGISLATIVE ACTIVITIES.

As already discussed, the Speech or Debate Clause protects Members of Congress "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski*, 387 U.S. at 85. That protection is an essential component of the Clause. Adequate pretrial procedures give meaning and substance to this aspect of the Clause's protections, and the Court should make pretrial procedures available in all prosecutions of Members of Congress to ensure that the Department does not force Members to defend themselves at trial for protected activity simply because that activity is not patently legislative on the face of an indictment. By failing to require these procedures, the court of appeals erred.

Analogizing Speech or Debate protections to the protections of the Double Jeopardy Clause, this Court recognized in *Helstoski II* that a privilege not to be tried is an empty privilege unless accompanied by a right to a

---

[3] The Department has argued that *Swindall* is factually distinguishable because it involved an attempt to prove a Member of Congress's knowledge rather than influence. However, the Department has never articulated why this is a distinction with a difference, and in fact it is not.

pretrial appeal under 28 U.S.C. § 1291. Relying on its opinion in *Abney v. United States*, 431 U.S. 651 (1977), concerning the right to a pretrial appeal of a Double Jeopardy claim, the Court held that "if a Member 'is to avoid *exposure* to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his . . . challenge to the indictment must be reviewable before . . . exposure [to trial] occurs.'" *Helstoski II*, 442 U.S. at 508 (quoting *Abney*, 431 U.S. at 662). A Member has the right to a pretrial appeal because, as in a prosecution implicating the Double Jeopardy Clause, the challenge is to "'the very authority of the Government to hale him into court to face trial'" and the "'rights conferred . . . by the . . . Clause would be significantly undermined if appellate review of . . . claims were postponed until after conviction and sentence.'" *Helstoski II*, 442 U.S. at 507 (quoting *Abney*, 431 U.S. at 659, 660).

For the same reasons, pretrial procedures are necessary to effectuate a Member's right to a pretrial appeal on Speech or Debate grounds. As with First Amendment protections, the Department should be required to plead an indictment with specificity under a heightened pleading standard because of the constitutional implications to the indictment of a Member of Congress. *National Organization for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 807 (1994) (Souter, J. and Kennedy, J., concurring) (heightened pleading required in First Amendment RICO case). Next, there must be a pretrial proceeding in which an appropriate record can be made to test a Speech or Debate claim. Rules must exist

about going forward with proof, burden of persuasion and weight of the evidence. Finally, there must be a procedure that takes account of other constitutional rights, such as the privilege against self-incrimination. As in the Double Jeopardy context, *see, e.g., United States v. Ragins*, 840 F.2d 1184, 1192 (4th Cir. 1988), once the Member makes a prima facie, non-frivolous claim that the prosecution seeks to rely on matters that are within the sphere of legitimate legislative activity, the burden shifts to the Department to show that there is no violation of the Clause's protection. These procedures will advance the "practical" reading of the Clause that recognizes that legislative action frequently occurs outside "the four walls of either Chamber," *Hutchinson v. Proxmire*, 443 U.S. 111, 124 (1979), and enforce the Clause's prohibition on "any showing of how [a legislator] acted, voted, or decided." *Brewster*, 408 U.S. at 527. The court of appeals erred by rejecting these procedures.

While this Court has not yet addressed whether pretrial procedures accompany the Speech or Debate right to appeal, it has recognized with approval that every court of appeals to have considered the issue[4] has held that the same

---

[4] *United States v. Ragins*, 840 F.2d 1184, 1192 (4th Cir. 1988); *United States v. Loyd*, 743 F.2d 1555, 1562-63 (11th Cir. 1984); *United States v. Booth*, 673 F.2d 27, 30-31 (1st Cir.), *cert. denied*, 456 U.S. 978 (1982); *United States v. Bendis*, 681 F.2d 561, 564 (9th Cir.), *cert. denied*, 459 U.S. 973 (1982); *United States v. Jabara*, 644 F.2d 574, 576-77 (6th Cir. 1980); *United States v. Stricklin*, 591 F.2d 1112, 1124 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979); *United States v. Tercero*, 580 F.2d 312, 315 n.12 (8th Cir. 1978); *United States v. Inmon*, 568 F.2d 326, 331-32 (3d Cir. 1977); *United States*

procedures are a necessary consequence of the *Abney* right to an appeal of a Double Jeopardy claim. *See Grady v. Corbin*, 495 U.S. 508, 522 n.14 (1990) (citing *Ragins*, 840 F.2d at 1192), *overruled on other grounds by United States v. Dixon*, 113 S. Ct. 2849 (1993). The Court described a pretrial challenge to the prosecution's evidence as an "essential procedural mechanism" for assessing claims and implementing the Double Jeopardy guarantee against successive prosecutions for the same offense. *Grady*, 495 U.S. at 522 n.14. Those pretrial procedures likewise are an essential mechanism for implementing a Member's constitutional right not to be exposed to trial for his legislative acts and motivations.

In *Ragins*, the Fourth Circuit explained why pretrial procedures are necessary to protect the right not to be tried under the Double Jeopardy Clause:

> When a double jeopardy claim is raised before commencement of the second trial, however, a defendant is at a serious disadvantage in attempting to prove the identity of the successive offenses charged to him. There is as yet no record from the second trial, and the rules of criminal procedure give the defendant little opportunity to discover the proof on which the government intends to rely in that trial. He must therefore rely on the

---

v. Mallah, 503 F.2d 971, 986 (2d Cir.), *cert. denied*, 420 U.S. 995 (1975); *United States v. Castro*, 629 F.2d 456, 466 (7th Cir. 1980) (Fairchild, C.J., concurring).

> indictments themselves, his own testimony, and any testimony he can obtain from his co-defendants and other third-parties. But the government controls the precision with which the second offense is charged, the defendant's own testimony is unlikely to carry much weight, and he is unable to offer his co-defendants immunity for their testimony. Unless the prosecution is utterly inept in drafting the two indictments, then, it will often be impossible for the defendant to carry the burden of proving that the two offenses charged against him are in reality one and the same.

Ragins, 840 F.2d at 1191-92; *see also Inmon*, 568 F.2d at 329-30, 332.

Those same considerations apply with equal force to a Speech or Debate challenge to an indictment, and the analysis of the court of appeals below conflicts with that of the circuit courts of appeals cited above. Where the indictment is not "utterly inept," a Member has limited information to demonstrate that the charged conduct consists of protected legislative activity compelled by the committee process and "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn*, 103 U.S. at 204. This is especially true here, where the prosecution is not predicated on promises to perform legislative acts and Congressman McDade is challenging the indictment on a motion to dismiss without the benefit of any evidentiary record or showing by the Department as to how it will use Congressman McDade's

committee memberships and responsibilities. Indeed, the Department predicated its indictment on the theory that executive contact is *per se* unprotected, which draws into question the validity of the entire prosecution. (*See, e.g.*, Government's Response to the Defendant's Motion to Dismiss the Indictment Based Upon the Speech or Debate Clause at 9, 12) Without pretrial procedures, an erroneous presumption such as this will result in an unconstitutional trial.

Congressman McDade has argued that these procedures are part and parcel of the right not to be tried and to a pretrial appeal, yet the court of appeals refused even to address this critical aspect of his appeal.[5] The resulting vacuum opens the door to prosecutions that cannot be scrutinized until the trial itself, at which point the Speech or Debate Clause already will have been irreparably violated. Accordingly, the Court should grant this petition and require district courts to follow those procedures in any

---

[5] The court of appeals invoked the collateral order doctrine and considered the issue of pretrial procedures of insufficient importance for the court to address. (A-46 to A-51) However, each of the issues raised by Congressman McDade – dismissal, excising, bill of particulars, offer of proof and accompanying burdens of proof – was (1) conclusive, (2) resolved an important issue completely separate from the merits, and (3) will be effectively unreviewable on appeal from a final judgment. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1995-96 (1994); *Helstoski II*, 442 U.S. at 506. "When a policy is embodied in a constitutional . . . provision entitling a party to immunity from suit . . . there is little room for the judiciary to gainsay its 'importance.'" *Digital Equip.*, 114 S. Ct. at 2001.

prosecution of a Member of Congress who raises on a motion to dismiss or otherwise before trial a prima facie, non-frivolous claim of a prosecution's reliance on acts within the legislative sphere. In light of the increasing frequency with which the Department is bringing indictments against Members of Congress, it is vital that the Court address this issue and provide guidance for the lower courts.

The need to address the availability of pretrial procedures to test Speech or Debate claims is particularly acute with respect to legislative oversight activity. The legislative character of oversight activity is not always apparent (A-43 to A-44; A-56 to A-57), and pretrial procedures allow a court to unmask legislative activity shrouded by the various allegations of an indictment. *See Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (Members protected from "cost and inconvenience and distractions of a trial upon a conclusion of the pleader."). This is equally true with respect to the Department's use of committee membership, which may serve as a proxy for legislative acts. The court of appeals, however, failed to establish any pretrial procedures to ensure, *before* submitting a Member of Congress to a potentially unconstitutional trial, that a prosecution does not encroach upon the protected sphere. (A-44 to A-46) Instead, it provided only hypothetical speculation – whose accuracy cannot be determined on this record – that the prosecution would not violate the Clause. (A-32) Only pretrial procedures can guarantee the Clause's absolute constitutional right not to be questioned for legislative acts.

CONCLUSION

For the foregoing reasons, petitioner Joseph M. McDade respectfully requests that this Court grant his petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

James D. Crawford*
Schnader, Harrison, Segal & Lewis
1600 Market Street, Suite 3600
Philadelphia, PA 19103

Sal Cognetti, Jr.
Foley, Cognetti & Cowley
507 Linden Street, 7th Fl.
Scranton, PA 18503

G. Robert Blakey
Notre Dame Law School
Notre Dame, IN 46556

Attorneys for the Honorable Joseph M. McDade

Dated: November 7, 1994

** Counsel of Record*